No. 84-219

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

CHARLES P. MORRIS, *et al.*,
*Petitioners,*

v.

PROVIDENCE HOSPITAL,
*Respondent.*

## OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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September, 1984

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33 pp

## QUESTION PRESENTED

Whether a tort action brought by an employee against his employer, on the basis of improper medical treatment administered by the employer to the employee for work-related injuries, is barred by the exclusive remedy provision of the Workmen's Compensation Law for the District of Columbia.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings below in the United States Court of Appeals for the District of Columbia Circuit were petitioners, Charles P. Morris and Henrietta Morris, and the respondent Providence Hospital, a corporation owned by the Daughters of Charity.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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No. 84-219

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CHARLES P. MORRIS, *et al.*,
*Petitioners,*

v.

PROVIDENCE HOSPITAL,
*Respondent.*

---

## OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

---

Respondent, Providence Hospital, respectfully prays that the Petition for Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit be denied.

## OPINIONS BELOW

The memorandum opinion of the District of Columbia Court of Appeals dated January 31, 1983 is an unreported opinion.

The memorandum opinion of the Honorable Louis Oberdorfer, Judge of the United States District Court for

the District of Columbia, dated June 22, 1983 is an unreported opinion.

The memorandum opinion of the United States Court of Appeals for the District of Columbia Circuit dated April 13, 1984 is an unreported opinion.

## STATEMENT OF THE CASE

The petitioner, Charles Morris, was injured during the course of his employment for the Appellee and received medical care for that injury from the respondent, his employer.

The petitioners filed suit in the Superior Court for the District of Columbia seeking damages for personal injury and loss of consortium for alleged negligence in rendering the medical care. Judge Sylvia Bacon granted a Motion to Dismiss on the authority of *Lindsay v. George Washington University,* 108 U.S. App. D.C. 44, 279 F.2d. 819 (1960) because the exclusive remedy provided by the law of the District of Columbia against the employer is limited to those payments required of the employer for work-related injuries, including any complication thereof, caused by medical treatment. The decision was appealed, and it was conceded at argument that *Lindsay,* supra was controlling. The panel of the District of Columbia Court of Appeals was constrained by the Court's rules from overturning a controlling precedent, and suggested that the only avenue for the Appellants (Petitioners here) to pursue would be a request for a hearing *en banc,* which Petitioners did. The District of Columbia Court of Appeals, sitting *en banc,* denied the request and noted that it did not consider it a matter of controlling local law but of interpretation of a federal statute. The Petitioners filed a request for reconsideration contending it was a local statute

and of sufficient importance to warrant an *en banc* hearing and this was denied. No petition for Writ of Certiorari, to the District of Columbia Court of Appeals was filed with this Court.

The Petitioners then filed a suit in the United States District Court alleging the same matters as in the Superior Court case. This Respondent moved to dismiss or for summary judgment on the basis that there was no federal jurisdiction, that the Petitioners having chosen to bring the action in the District of Columbia Courts could not refile in the federal court, even if there had been a federal question, and on the basis that *Lindsay, supra* controlled. The District Court agreed with Petitioner that the merits of the litigation had never been heard or decided by any court, so that res judicata doctrines are inapplicable. The District Court assumed without deciding that there was a federal question presented by the case but that *Lindsay, supra* is dispositive of Petitioners' claim and granted the Motion for Summary Judgment and dismissed the Complaint.

Petitioner filed a Notice of Appeal to this dismissal and Respondent crossappealed the trial court's rulings on jurisdiction. A panel of the United States Court of Appeals for the District of Columbia affirmed the District Court's ruling, stating that the District of Columbia Court of Appeals was not clearly bound to follow *Lindsay, supra* citing *M.A.P. v. Ryan,* 285 A.2d 310 (D.C. 1971) for this proposition, but that it would not consider overturning *Lindsay, supra* unless sitting *en banc.* Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied.

## REASON FOR DENYING THE PETITION

Respondent respectfully submits that the legal issue presented below involves application of local law and not a federal question that should concern this Court in review. In support of its position Respondent states as follows:

### I. THE LEGAL ISSUE RAISED IN THE CASE BELOW INVOLVES THE APPLICATION OF LOCAL LAW OF THE DISTRICT OF COLUMBIA REGARDING TORT ACTIONS AS AFFECTED BY THE EXCLUSIVE REMEDY PROVISION OF THE DISTRICT OF COLUMBIA WORKMEN'S COMPENSATION STATUTE, D.C. CODE §36-501 (1973).

The underlying suit upon which the petition is based is a tort action. More specifically it is a suit in which the Petitioners allege injury and damages as a result of lack of proper medical care by the Respondent. It is what is commonly called a medical malpractice case. Such a cause of action does not arise from a federal law, but finds its origin in the common law of the District of Columbia. As a defense to this cause of action, Respondent has successfully relied on the exclusive remedy provision of the District of Columbia's Worker's Compensation Act. D.C. Code §36-501 (1973). Petitioners have argued for federal jurisdiction below by recognizing that in 1928 the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* (1973), was adopted as the workmen's compensation law for the District of Columbia and that in 1935 this Court granted writ of certiorari involving a decision of the United States Court of Appeals for the District of Columbia construing the Longshoremen's and Harbor Workers' Compensation Act. *Del Vecchio v. Bowers,* 56 S. Ct. 190, 296 U.S. 280, (1935). However, a review of *Del Vecchio* clearly indicates that it is a decision dealing only

with the interpretation of what was compensable under the Act. *Del Vecchio* can easily be distinguished from the local nature of this action which involves more than just the application of a federal statute itself, but has effect on a common law tort in the District of Columbia.

Further, both the United States Court of Appeals for the District of Columbia and the District of Columbia Court of Appeals have stated that the District of Columbia Workmen's Compensation Act was a congressional enactment of a local District of Columbia statute dealing exclusively with local matters. *Gudmundson v. Cardillo,* 75 U.S. App. D.C. 230, 126 F.2d 521 (1942); *Director of Office of Whrs' Comp. v. National Van Lines, Inc.,* 198 U.S. App. D.C. 239, 613 F.2d 972 (1979). *District of Columbia v. Greater Washington,* D.C. App. 442 A.2d 110 (1981), hearing *en banc* denied 445 A.2d 960 (1982). It seems obvious that in this case, the U.S. Court of Appeals for the District of Columbia agreed that the issue was local in nature rather than federal when it said in its Memorandum Opinion that the D.C. Court of Appeals was not clearly prevented from considering overruling its prior decision in *Lindsay v. George Washington University,* 108 U.S. App. D.C. 44, 279 F.2d 819 (1960).

On several occasions this Court has recognized its policy not to interfere with local rules of law fashioned by the Courts of the District of Columbia. *Miller v. U.S.,* 78 S. Ct. 1190, 357 U.S. 301, 2 L.Ed. 2d 1332, (1958). *Pernell v. Southall Realty,* 94 S. Ct. 1723, 416 U.S. 363, 40 L.Ed. 198 (1974). *Fisher v. United States,* 66 S. Ct. 1318, 328 U.S. 463 (1946). Respondent urges this Court to apply this policy regarding this case.

## II. PETITIONERS ARE ATTEMPTING TO PERSUADE THIS COURT TO FOLLOW THE DOCTRINE OF DUAL CAPACITY THAT THIS COURT HAS NEVER ADOPTED AND WHICH HAS BEEN FOLLOWED ONLY BY A SMALL MINORITY OF STATE COURTS.

Petitioners argue that this Court has recognized the Dual Capacity Doctrine and cite for this proposition the case of *Reed v. The YAKA*, 373 U.S. 410 (1963). Nowhere in the opinion of this decision can be found the language "dual capacity doctrine." In 1972 Congress amended the Longshoremen's Act, Section 5(b) providing:

> The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the same time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this Act.

Longshoremen's and Harbor Workers' Compensation Act, Sec. 5(b), as amended by P.L. 92-576, effective November 26, 1972.

This amendment in effect eliminated the liability exposure created by *Reed, supra.* This Court has concededly also held an employer that is both shipowner and stevedore liable to an injured employee under the Longshoremen's Act and for negligence in *Jones & Laughlin Steel Corp. v. Pfeifer,* 103 S. Ct. 2541, ____ U.S. ____ (1983). However, again there is no dual capacity analysis underlying the Court's rationale of the decision. The reason for the decision is rather based on the intent of Congress as implied from the 1972 language of the amendment of Section 5(b) and from a passage from the House Committee report. See 2A Larson, Workmen's Compensation Law §72.84 at 14-248 (1982).

Petitioner argues that this concept of dual capacity is such a compelling concept that the majority of states are following it. This is not so. The concept of dual capacity first appeared in the State of California, *Duprey v. Shane,* 39 Cal. 2d 781, 249 P.2d 8 (1952). However, the Supreme Court of California refused to apply this doctrine to a factory worker who allegedly died from improper medical treatment given by his employer for a work-related injury. *Dixon v. Ford Motor Company,* 53 Cal. App. 3d 499, 125 Cal. Rptr. 872 (1975). The dual-capacity doctrine has been legislatively abolished in California in August, 1982. Assembly Bill No. 684, Sec. 6, amending §3602 of the Labor Code.

The concept of dual capacity for allowing an employee to recover against his employer for alleged medical malpractice has been soundly criticized in a learned treatise by Arthur Larson.

*Larson, supra,* and has been followed by the Supreme Court of Illinois. *McCormick v. Caterpillar Tractor Co.,* 85 Ill. 2d 352, 423 N.E. 2d 876 (1981). In that opinion the Court held that an employer who allegedly caused an aggravation of an employee's work-related injury could not be held responsible for paying for this aggravation under the Worker's Compensation Statute and also liable under a tort theory.

## III. PETITION FOR WRIT OF CERTIORARI SHOULD HAVE BEEN SOUGHT FROM THE JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS BUT THAT TIME FOR FILING SUCH A PETITION HAS EXPIRED.

The District of Columbia Court of Appeals affirmed the decision of the Superior Court of the District of Columbia on January 31, 1983 and denied *en banc* hearing on No-

vember 10, 1982. Petitioner had 90 days from the denial of rehearing by the District of Columbia Court of Appeals to file a Petition for Writ of Certiorari. 28 U.S.C. §2101(c). Instead, the Petitioners attempted to attack the decision of the D.C. Court of Appeals collaterally which is not permitted. *Hardison v. Alexander,* 211 U.S. App. D.C. 51, 655 F.2d 1281 (1981). This is true even when dealing with state court decisions involving claimed or claimable federal questions. *Reich v. City of Freeport,* (CCA 7 1975) 527 F.2d 666; *Roy v. Jones,* (CCA 3 1973) 484 F.2d 96; *Paul v. Dade County, Florida* (CCA 5 1969) 419 F.2d 10. It is well recognized that since the District of Columbia Court Reform and Criminal Procedure Act of 1970. Pub. L. No. 91-358. The District of Columbia Court of Appeals was made the highest court of the District similar to a State Supreme Court. *Pernell, supra,* at page 367. *M.A.P. v. Ryan* (D.C. App.) 285 A.2d 310 (1971). As such, decisions that were to be challenged further would be either by appeal or petition for writ of certiorari to this Court and not by filing suit in the U.S. District Court or by appeal to the United States Courts of Appeals for the District of Columbia.

## CONCLUSION

Wherefore, the Respondent, Providence Hospital prays that this Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,

WELCH, MURPHY & WELCH

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*Attorney for Respondent*

September, 1984

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 83-1779 — September Term, 1983
Civil Action No. 83-01314

Charles P. Morris,

Appellant

Henrietta Morris
Wife of Charles P. Morris

v.

Providence Hospital

---

No. 83-1786 — Civil Action No. 83-01314

Charles P. Morris, et al.

v.

Providence Hospital,

Appellant

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: EDWARDS and SCALIA, Circuit Judges, and FRIEDMAN, *Circuit Judge, United States Court of Appeals for the Federal Circuit.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia. Upon consideration of the foregoing, it is

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*Sitting by designation pursuant to 28 U.S.C. §291(a) (1976).

ORDERED and ADJUDGED, by this Court, that the decision of the District Court is affirmed, for the reasons set forth in the accompanying Memorandum.

It is ORDERED, *sua sponte,* that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See Local Rule 14, as amended on November 30, 1981 and June 15, 1982. This instruction to the Clerk is without prejudice to the right of any party at any time to move for expedited issuance of the mandate for good cause shown.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam
For The Court

/s/ George A. Fisher
Clerk

## MEMORANDUM

Although the D.C. Court of Appeals sitting *en banc* has suggested that it is bound by our prior decision in *Lindsay v. George Washington University,* 279 F.2d 819 (D.C. Cir. 1960), it is not at all clear that they were so bound in this case, or that they should consider themselves so bound in the future. *See M.A.P. v. Ryan,* 285 A.2d 310, 312 (D.C. 1971). It is clear, however, that our prior decision in *Lindsay* is squarely on point, and, absent a reconsideration of *Lindsay* by this court sitting *en banc,* we will not overrule a prior decision by a panel in this Circuit. *See United States v. Caldwell,* 543 F.2d 1333, 1369 n.19 (D.C. Cir. 1974) (as amended 1975) (Supplemental Opinion), *cert. denied,* 423 U.S. 1087 (1976); *United States v. Lewis,* 475 F.2d 571, 574 (5th Cir. 1972). Accordingly, the District Court properly granted summary judgment for the appellee and dismissed the complaint.

FILED APR 13 1984

GEORGE A. FISHER
Clerk

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| CHARLES P. MORRIS, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action |
| | ) | No. 83-1314 |
| PROVIDENCE HOSPITAL, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

### MEMORANDUM

Charles Morris was employed as a chauffeur by defendant hospital. The hospital's Employee Health Care Center treated him for acute back pain suffered while on the job. Later the hospital staff performed surgery which was unsuccessful. The complaint here alleges that as a result of the defendant hospital's negligent performance of the medical services it rendered to Mr. Morris, he has suffered loss of bladder and bowel control, paralysis of both feet, significant loss of leg functioning, severe shock to his nervous system and permanent disability. Mrs. Morris sues for loss of her husband's consortium.

The hospital moves to dismiss the complaint or for summary judgment. Its theory is twofold: first, that the District of Columbia workmen's compensation statute. D.C. Code § 36-501 (1973), provides the exclusive remedy for plaintiffs and, as a local statute, does not provide this Court with the federal question jurisdiction that plaintiffs allege; and second, that plaintiffs have already litigated and lost this case in the Superior Court for the District of

Columbia and are therefore barred from relitigating it here on *res judicata* grounds.

The first argument speaks for itself; the second requires explication. Defendant's exhibits show and (plaintiffs concede) that this same medical malpractice suit was earlier filed in the Superior Court of the District of Columbia. *Morris v. Providence Hospital,* C.A. 9449-81 (June 25, 1981). That court dismissed the complaint on the authority of *Lindsay v. George Washington University,* 279 F.2d 819 (D.C. Cir. 1960).*

On appeal from the dismissal of the Morris case, a panel of the District of Columbia Court of Appeals considered itself bound by *Lindsay* and therefore affirmed, suggesting that plaintiffs seek a rehearing *en banc* so that the court could "address more fully" the contention that *Lindsay* should be reexamined. *Morris v. Providence Hospital,* No. 82-182 (D.C. Ct. App. Jan. 31, 1983). The D.C. Court of Appeals sitting *en banc* denied rehearing, however, on the ground that "the issue presented is one of interpretation of a federal statute thus precluding a question of local law construction." *Morris v. Providence Hospital,* No. 82-182 (D.C. Ct. App. March 16, 1983). No petition for certiorari from this *en banc* decision was filed.

Plaintiffs oppose defendant's motion on both grounds. They contend that the *merits* of this litigation have never

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*In *Lindsay,* an employee of defendant hospital was injured while on the job and was treated for his injury by the hospital. His injuries were much less serious than plaintiffs' here, but he also sued the hospital for malpractice. In affirming a grant of summary judgment for the hospital, the Court of Appeals stated that the exclusivity clause of the workmen's compensation statute was not avoided by "the fortuity that the employer . . . also operated the hospital where the professional services complained of were rendered." *Id.* at 821.

been heard or decided by any court, so that *res judicata* doctrines are inapplicable. This response is accurate.

As to federal question jurisdiction, plaintiffs point out that the D.C. Workmen's Compensation Act of 1928 adopted the identical language of the federal Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a). They cite *Del Vecchio v. Bowens,* 296 U.S. 280, 281-282 (1935), for the proposition that issues involving the District of Columbia Workmen's Compensation Act are federal questions because their resolution sets nationwide precedent for the identical federal Act. Plaintiffs further point to the order of the D.C. Court of Appeals denying them rehearing, essentially because the case raised a federal question. Thus plaintiffs argue that federal jurisdiction in this case is proper and in fact required.

In the present posture of this case, it may be assumed that there is a federal question and that, in declining to address it, the local Appeals Court preserved the underlying merits for consideration when and if the precedential question is settled. *Res judicata* is therefore no bar. But *Lindsay* is. At oral argument the parties conceded, and the Court has determined, that plaintiffs' case cannot be distinguished from *Lindsay* and that *Lindsay* is dispositive of their claim. The original D.C. Court of Appeals panel hinted that *Lindsay* might merit reconsideration; *see also Tatrai v. Presbyterian University Hospital,* 439 A.2d 1162 (Pa. 1982) (concurring majority opinion) (adopting "dual capacity" theory to permit recovery by employees against employers not acting as employers at the time of injury); *D'Angona v. County of Los Angeles,* 27 Cal. 3d 661, 613 P.2d 238 (1980) (same); *Guy v. Arthur H. Thomas Co.,*378 N.E.2d 488 (Ohio 1978) (same). The *en banc* court's reaction indicates an expectation that such requests for reconsideration should be addressed to the federal

Court of Appeals that decided *Lindsay*. In any case, *Lindsay* is binding on this Court. On its authority, the accompanying Order will grant defendant's motion for summary judgment and dismiss the complaint.

Date: June 22, 1983 /s/ Louis F. Obendorfer
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| CHARLES P. MORRIS, *et al.*, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| | ) | |
| v. | ) | Civil Action |
| | ) | No. 83-1314 |
| PROVIDENCE HOSPITAL, | ) | |
| | ) | |
| Defendant. | ) | |
| | ) | |

**ORDER**

For reasons stated in the accompanying Memorandum, it is this 22d day of June, 1983, hereby

ORDERED: that defendant's motion for summary judgment is GRANTED: and it is further

ORDERED: that the complaint should be and is hereby DISMISSED.

/s/ Louis F. Obendorfer
UNITED STATES DISTRICT JUDGE

FILED
JUNE 22, 1983
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

## APPENDIX C

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 82-182
CHARLES P. MORRIS, ET AL., Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

### ORDER

On consideration of appellants' motion for reconsideration in support of petition for rehearing en banc, it is

ORDERED that appellants' motion for reconsideration is denied.

PER CURIAM

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

Mark J. Brice, Esq.
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Walter J. Murphy, Jr., Esq.
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Wheaton, MD 20902

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
APR 14 1983
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Clerk

# DISTRICT OF COLUMBIA
# COURT OF APPEALS

No. 82-182
CHARLES P. MORRIS,
AND HENRIETTA MORRIS, Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

## ORDER

On consideration of the petition for rehearing en banc and the ensuing pleadings relating thereto, and it appearing to the court that the issue presented is one of interpretation of a federal statute thus precluding a question of local law construction, it is

ORDERED that the aforesaid petition is denied.

PER CURIAM

Copies to:

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DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
MAR 16 1983
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Clerk

## APPENDIX D

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 82-182

CHARLES P. MORRIS, et al.,
Appellants,

v. CA 9449-81

PROVIDENCE HOSPITAL,
Appellee.

Appeal from the Superior Court of the
District of Columbia
Civil Division
(Hon. Sylvia Bacon, Trial Judge)

(Argued January 20, 1983 Decided January 31, 1983)

Before KERN, NEBEKER and FERREN, *Associate Judges.*

MEMORANDUM OPINION AND JUDGMENT

Appellant injured his back in April 1980, in the course of his employment as a chauffeur for Providence Hospital. Immediately following the injury, and for several weeks thereafter, appellant received treatment at the Employees Health Dispensary of Providence Hospital. During the course of appellant's treatment, his condition worsened, surgery was required (but was unsuccessful), and appellant is now partially paralyzed.

Appellant and his wife brought suit against Providence Hospital in June 1981, alleging malpractice in the treatment of his back injury, and claiming, *inter alia,* loss of consortium for his wife. Their suit was dismissed by the

trial court on the authority of *Lindsay v. George Washington University,* 2798 F.2d 819 (D.C. Cir. 1960), which held on similar facts that a suit against the employer for damages, in addition to workmen's compensation, is barred by the exclusive liability provisions of the D.C. Workmen's Compensation Act.[1]

The parties are agreed that this case is not significantly distinguishable from the *Lindsay* case and therefore that *Lindsay* is controlling precedent. However, appellant argues that the *Lindsay* decision is unjust to an employee in circumstances where the injury results from acts of the employer which are independent from and unrelated to the employer-employee relationship. Appellant urges that court to adopt the "dual capacity" doctrine applied in other jurisdictions to permit recovery against an employer for injuries incurred in transactions where the employer was acting, not as employer, but as a separate "third" person.[2] *E.g., Duprey v. Shane,* 39 Cal.2d 781, 249 P.2d 8 (1952); *D'Angona v. County of Los Angeles,* 27 Cal.2d 661, 613 P.2d 238 (1980); *Guy v. Arthur H. Thomas Co.,* 55 Ohio St.2d 183, 378 N.E.2d 488 (1978); *Tatria v. Presbyterian University Hospital,* 439 A.2d 1162 (Pa. 1982); *see* 2A A. Larson, Larson's Workmen's Compensation Law, §§ 72.61(c), 72.81 (1982).

However, under *M.A.P. v. Ryan,* 285 A.2d 310 (D.C. 1971), we may not refuse to follow such a controlling prior

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[1]Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901, *et. seq.*, as made applicable to the District of Columbia by D.C. Code § 36-501 (1973 ed.). 33 U.S.C. § 905 provides that the liability of an employer as prescribed by the Act "shall be exclusive and in place of all other liability of such employer to the employee. . . ."

[2]33 U.S.C. § 933 describes a third party as "some person other than the employer or a person or persons in his employ."

opinion of the United States Court of Appeals for the District of Columbia Circuit except by decision of the full court sitting en banc. Thus, we are constrained to affirm the trial court's dismissal of appellant's suit. Of course, appellant may wish to use his petition for hearing en banc as a petition for rehearing en banc; and appellee may then file a response thereto. The full court may then consider the need to address more fully the contentions in light of the division's holding that *Lindsay* is controlling.

Accordingly, it is ORDERED and ADJUDGED that the judgment on appeal herein is affirmed.

FOR THE COURT:

/s/ Alan I. Herman
Alan I. Herman, Clerk.

Copies to:

Honorable Sylvia Bacon

Clerk, Superior Court

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DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
JAN 31 1983
/s/ Alan I. Herman
Clerk

## APPENDIX E

DISTRICT OF COLUMBIA COURT OF APPEALS
500 Indiana Avenue, N.W.
Washington, D.C. 20001
(202) 638-7113

No. 82-182
CHARLES P. MORRIS, ET AL., Appeliants,

v. CA 9449-81

PROVIDENCE HOSPITAL, Appellee.

BEFORE: Newman, Chief Judge; Kelly, Kern, Nebeker, Mack, Ferren, Pryor, Belson, and Terry, Associate Judges.

### ORDER

On consideration of appellants' petition for hearing en banc and it appearing that the majority of the judges of this court has voted to deny the petition, it is

ORDERED that appellants' petition for hearing en banc is denied.

PER CURIAM

Copies to:

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DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED
NOV 10 1982
/s/ Alan I. Herman
Clerk

## APPENDIX F

## UNITED STATES COURT OF APPEALS
## FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS, et al., Appellants
Civil Action No. 83-01314

v.

Providence Hospital

---

And Consolidated Case No. 83-1786

BEFORE Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges and Friedman,* Circuit Judge, United States Court of Appeals for the Federal Circuit

### ORDER

The Suggestion for Rehearing *en banc* of Appellants Morris, et al., has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion is denied.

*Per Curiam*

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk



*Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

# UNITED STATES COURT OF APPEALS
# FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS, et al., Appellants
Civil Action No. 83-01314

v.

Providence Hospital

---

And Consolidated Case No. 83-1786

BEFORE Edwards and Scalia, Circuit Judges, and Friedman, Circuit Judge, United States Court of Appeals for the Federal Circuit

## ORDER

On consideration of the Petition for Rehearing of Appellants Morris, et al., filed April 26, 1984, it is

ORDERED that the aforesaid Petition for Rehearing is denied.

*Per Curiam*

For the Court:

GEORGE A. FISHER, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

---

*Sitting by designation pursuant to Title 28 U.S.C. § 291(a).

# UNITED STATES COURT OF APPEALS
# FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 83-1779 September Term, 1983

CHARLES P. MORRIS,

Appellants

Henrietta Morris
Wife of Charles P. Morris

v.

Providence Hospital

---

AND CONSOLIDATED CASE No. 83-1786

BEFORE Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald Mikva, Edwards, Ginsburg, Bork, Scalia and Starr, Circuit Judges

## ORDER

The Suggestion for Initial Hearing *En Banc*, filed September 27, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid Suggestion for Hearing *En Banc* is denied.

*Per Curiam*

For the Court:
GEORGE A. FISHER, CLERK

BY: /s/ Daniel M. Cathey
First Deputy Clerk